No. 14721

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROSCOE WAGNER, D/B/A WAGNER TRANSPORTATION COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*),[1] for enforcement of its order issued against respondent on December 6, 1954, following the usual proceedings under Section 10 of the Act. The Board's decision and order (R. 13–43) [2] are reported at 110 N. L. R. B. No. 192. This Court has jurisdiction of the proceeding under Sec-

[1] Relevant provisions of the Act appear in the Appendix to this brief, pp. 12–14, *infra*.

[2] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tion 10 (e) of the Act, the unfair labor practices having occurred in Twin Falls, Idaho, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's findings and conclusions

Briefly, the Board found that respondent violated Section 8 (a) (3) of the Act by discharging Employee Cecil Weyer because of his membership in the General Teamsters, Warehousemen and Helpers Union, Local No. 483, AFL, herein called the Union; and violated Section 8 (a) (1) by this and other conduct. Where the testimony was in conflict, the Board adopted the credibility findings of the Trial Examiner. The evidence upon which these findings are based is summarized below.

A. Interference, restraint, and coercion

Early in 1954, Clinton Funk, a truck driver in respondent's employ, obtained a number of application cards from the Union and attempted to induce his fellow employees to sign them (R. 16, 21; 77–78). Respondent promptly manifested determined opposition to the Union's organizational campaign. Respondent Roscoe Wagner, who manages the business, told Funk "that if the union ever did step in it would ruin him" (R. 21; 78–79).

[3] Respondent operates a fleet of trucks to and through the States of Idaho, Oregon, Nevada, Washington, Utah, and California, under a certificate from the Interstate Commerce Commission. Respondent's gross revenue from such operations is about $350,000 annually, of which about $250,000 is derived from the transportation of commodities in interstate commerce. (R. 15; 7, 10). No jurisdictional issue is presented.

A few days later, on February 14, Roger Wagner, respondent's brother and assistant manager of the business, summoned Employee Richard Gear to his office and discharged him (R. 20; 87–88). In the course of the talk which accompanied the discharge, Wagner asked Gear if he "hadn't let [his] buddies talk [him] into something," and stated that he did not "think very much of" Gear for signing an application for union membership (R. 20; 88). When Gear replied that he had a right to sign it, Wagner said, "That is right, but you know we will never go union, they tried it once and we sold out" (R. 20; 88).[4] Wagner then told Gear that "he had the list of all the drivers who had signed up, that he knew who they were," and added: "You don't see good men [naming two of respondent's drivers] going union, do you?" (R. 20, 36; 89, 96). Roger Wagner later admitted to one of the other employees that Gear had been discharged for union activity (R. 18, 25, 38; 62, see pp. 5–6, *infra.*).[5]

A day or two later, Roger Wagner came up to Employee Fox, asked him if he "had been approached by the union as to this contract they were trying to draw up," and inquired how Fox "felt about the

[4] According to Roscoe Wagner, respondent and the Union had bargained concerning a contract in 1951, but they failed to reach an agreement that would permit him to operate "sleeper" trucks, and thereafter he disposed of some of his equipment and curtailed his business (R. 16; 109–110, 113–114, 105–106, 107–108).

[5] Since the complaint did not allege that Gear's discharge violated Section 8 (a) (3), the Board made no finding to that effect (R. 21). However, the Board found that respondent's statements in connection therewith violated Section 8 (a) (1). See p. 6, *infra.*

union" (R. 22; 85). Wagner then asked what Fox thought about "drawing up a contract just between the employer and employees" (R. 85). At about the same time, Roger Wagner asked Employees Jones and Sizemord "what the union boys wanted" (R. 26; 71). Jones replied that he did not know, to which Wagner responded, "You should know, you joined the union" (*id.*). Wagner then said, "You know, we don't have to go union. If I have to, I can sell out like I did before, we can just keep one or two trucks and run them ourselves" (*id.*)[6]

On February 28, respondent and the Union executed a consent election agreement (R. 17; 58). Just before the election, Roscoe Wagner asked Employee Funk, the leader in the union movement, what the employees thought was "wrong"; and again asserted "that if the union got in that their demands would be extremely high and that he couldn't meet them and that he would be forced to sell off all the equipment, and * * * put a lot of guys out of work" (R. 21, 25; 79–80). Wagner declared that the Union was "getting to be * * * like just a bunch of Communists," and that the local business agent "was strictly no good" and wanted to organize the employees "just to hold his own job" (R. 21; 80).

The election was held on March 4. The Union failed to receive a majority of the votes cast, but it filed objections and the Regional Director set the election aside (R. 21; 58–59).

[6] Both Roscoe Wagner and Roger Wagner occasionally acted as truck drivers (R. 113–114).

B. The discriminatory discharge of Cecil Weyer; further interference, restraint, and coercion

Cecil Weyer, a truck driver in respondent's employ, had been a member of the Union for about 15 years prior to his discharge (R. 17; 66). Early in February, he signed a new union authorization card (R. 17; 60). On February 16, Roger Wagner interrupted a conversation among three of the drivers, including Weyer, asking them, "How are you and the union doing? * * * I hear you fellows are organized" (R. 17–18, 36–27; 61). Weyer replied that he knew nothing of it, and when Roger Wagner asked if he had not signed a union application blank, answered that it was unnecessary for him to do so as he had been a member for 15 years (R. 18, 24, 37; 61). At this point, Roscoe Wagner, who had overheard the exchange, profanely called Weyer a "liar," pulled a piece of paper out of his pocket, held it up, and said, "I can tell you right where you signed this application and the day and everything, all about it" (*id.*). He then approached Weyer with doubled fist and threatened to "beat [Weyer's] head off" (*id.*). Weyer attempted to mollify Wagner, but Wagner announced: "I don't want to talk to a Communist. * * * I don't want no union man around here. They are just nothing but a bunch of Communists" (R. 18, 24, 37; 61–62). Roscoe Wagner then told Weyer that he, Weyer, was "going to resign" (R. 18, 24, 37; 62). When Weyer asserted that he would not do so, Roscoe Wagner instructed Roger Wagner to "fix up [Weyer's] resignation papers" (*id.*).

Roger Wagner then prepared, and Roscoe Wagner signed, a statement that Weyer had "left of his own free will" and that "his services as a truck driver have been satisfactory" (R. 18; 13, 63). Roger gave the statement to Weyer, saying, "I hate to see this, you have been one of our best drivers. You know how Roscoe feels about the union. You know what happened to Dick Gear and Bob Sauers and some more of them" (R. 18, 23; 62). Roger added that "he wouldn't have a union man working for him and * * * he would sell every truck in the fleet if he had to" (R. 25; 63). As his conversation with Roscoe had been unpleasant and contained the suggestion of bodily harm, Weyer took the letter and left (R. 18, 24; 62, 64).

About April 30, respondent offered to reemploy Weyer, but Weyer refused the offer (R. 19; 65–66).

C. The Board's conclusions

The Board found (R. 36), in agreement with the Trial Examiner (R. 25–26), that respondent violated Section 8 (a) (1) of the Act by telling employees that Gear's discharge resulted from membership in the Union; threatening to sell all or part of his business if the Union organized the drivers; encouraging the employees to believe that their protected activities were under surveillance; and, in the context of this coercive conduct, interrogating the employees regard-

ing their union activities. The Board further found (R. 38–39) that respondent discharged Employee Weyer because of his union membership, in violation of Section 8 (a) (3) and (1).[7]

II. The Board's order

The Board's order (R. 39–41, 30–31) requires respondent to cease and desist from the unfair labor practices found, or from in any other manner interfering with his employees' statutory rights; to make Employee Weyer whole for any loss of pay he may have suffered by reason of the discrimination against him; and to post appropriate notices.

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained, and coerced his employees in the exercise of their organizational rights, in violation of Section 8 (a) (1) of the Act

The evidence summarized on pp. 2–6, *supra,* establishes that respondent (Roscoe Wagner) and his brother (Roger Wagner), who acted respectively as the Company's manager and assistant manager, told the employees that respondent might sell all or part of his business if the Union organized the employees, announced that Employee Gear was discharged be-

[7] The Trial Examiner dismissed that part of the complaint alleging that respondent discharged Employee Weeks because of his union activity, on the ground that he was discharged for business reasons (R. 22). The Board affirmed this dismissal (R. 41).

cause of his union membership, led the employees to believe that their union activities were under surveillance, and, in the context of this coercive conduct, interrogated the employees concerning their union activity. There can be no doubt that respondent thus engaged in the kind of interference, restraint, and coercion proscribed by Section 8 (a) (1) of the Act. See, e. g., *N. L. R. B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 904 (C. A. 9); *N. L. R. B.* v. *Howell Chevrolet Co.,* 204 F. 2d 79, 83 (C. A. 9), affirmed, 346 U. S. 482; *N. L. R. B.* v. *W. T. Grant Co.,* 199 F. 2d 711, 712–713 (C. A. 9), certiorari denied, 344 U. S. 928; *N. L. R. B.* v. *State Center Warehouse Co.,* 193 F. 2d 156, 157 (C. A. 9); *N. L. R. B.* v. *Anderson,* 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938; *R. R. Donnelley & Son* v. *N. L. R. B.,* 156 F. 2d 416, 419 (C. A. 7), certiorari denied 329 U. S. 810.

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discharged Employee Weyer because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act

The evidence summarized on pp. 2–6, *supra,* establishes that respondent Roscoe Wagner strongly opposed the Union's organizing drive; that when Weyer denied having signed a union authorization card, Roscoe angrily contradicted Weyer and told him that "you are going to resign" because "I don't want no union man around here;" and that after drawing up Weyer's termination slip, Roger Wagner told Weyer: "You know how Roscoe feels about the union, you

know what happened to Dick Gear and Bob Sauers and some more of them." These circumstances fully support the Board's finding that respondent discharged Weyer because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act. See *N. L. R. B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 906 (C. A. 9); *N. L. R. B.* v. *Smith Victory Co.*, 190 F. 2d 56, 57 (C. A. 2); *N. L. R. B.* v. *Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840, 843 (C. A. 4).

In his exceptions to the Intermediate Report, respondent's counsel contended, "Cecil Weyer was discharged for insubordination and because he called the Respondent a liar during an altercation with the Respondent, it further appearing from the record that the employee Cecil Weyer signed a written statement admitting that he had left the employ of the Respondent of his own free will and accord" (R. 32).[8] Counsel further asserted (R. 33), "Respondent became dissatisfied with Weyer's work when he learned that he had spent several hours on several different occasions visiting a certain motel in Nevada and that upon being accused of this act Weyer called the respondent a 'damned liar.' * * * the reason for the discharge was the insubordination on the part of Weyer and his inefficiency as a driver having shirked his responsibilities on several occasions." The Board properly rejected these contentions (R. 36–38, 22–25).

[8] Weyer's termination slip (R. 13, 63) does not in fact bear his signature.

First, the fact that, in virtually the same breath, respondent advances the two inconsistent contentions that Weyer resigned and that he was discharged for cause casts considerable doubt on the validity of both. *N. L. R. B.* v. *Radcliffe,* 211 F. 2d 309, 314 (C. A. 9), certiorari denied, 348 U. S. 833. Second, according to the testimony of Roger Wagner, the motel stopovers included only one serious delay, and this was not one of the "actual reasons" for Weyer's discharge (R. 18–19; 99). Third, the occasion for these stopovers had disappeared two months before the discharge, with Weyer's marriage to the woman whom he had stopped to visit, and respondent had never complained to Weyer about them (R. 22–23; 65, 67). Finally, the Trial Examiner, who had an opportunity to observe the witnesses, credited Weyer's denial that he had called Roscoe Wagner a liar, and discredited Roger and Roscoe Wagner's testimony that he had done so (R. 23, 38). We submit that on this state of the record, the Board's exercise of its power as a fact-finding body should not be disturbed. *N. L. R. B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 906–907 (C. A. 9); *N. L. R. B.* v. *Anderson,* 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the

record considered as a whole, and that a decree should issue enforcing the order in full.[9]

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[9] In his answer to the petition for enforcement, respondent contended for the first time that "the Respondent consented to an election at or about the time of the alleged violations and that the election was conducted by the National Labor Relations Board as provided by law, and that had the Respondent been guilty of the allegations contained in the Complaint or the charge made by the union, the election would not have been held" (R. 49). Apparently respondent refers to the Board's practice of refusing to conduct a representation election in a bargaining unit regarding which unfair labor practice charges are pending, unless the unions on the ballot file written waivers of their right to use the matters alleged in such charges as a basis for setting aside the election. See *Wells Dairies Cooperative*, 109 NLRB No. 1450. Respondent's contention is without merit, since the charges in the instant case were not filed until after the election had been held (R. 1, 58–59). As noted *supra*, p. 4, the Union lost the election, but for reasons not revealed by the record the Regional Director set it aside (R. 21; 58–59). In any event, not having made this contention before the Board, respondent is precluded by Section 10 (e) of the Act from making it before this Court. *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami*, 344 U. S. 344, 350; *N. L. R. B.* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. 2d 230, 233 (C. A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and pro-

ceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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